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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WINDHAM AT CARMEL MOUNTAIN RANCH ASSOCIATION, Plaintiff and Respondent, v. ROSLYN C. LACHER et al., Defendants and Appellants.	D071799 (Super. Ct. No. 37-2016-00016530-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed; remanded with directions.

Pamela G. Lacher, in Pro. Per.; and Law Offices of Pamela G. Lacher and Pamela G. Lacher for Defendants and Appellants.

Epsten Grinnell & Howell, Anne L. Rauch, Joyce J. Kapsal, Trinette S. Sachrison, and Gordon A. Walters for Plaintiff and Respondent.

Roslyn Lacher and Pamela Lacher (collectively, the Lachers) appeal from the trial court's granting of a preliminary injunction to vacate their premises temporarily to allow

for fumigation of termites, as well as the award of attorney fees to the Windham at Carmel Mountain Ranch Association (the Association), which brought the suit seeking the injunctive relief. The Lachers contend the court (1) abused its discretion by granting the preliminary injunction, (2) permitted a premature request for attorney fees, (3) erroneously determined the Association was the prevailing party, and (4) improperly failed to offset attorney fees paid by settling defendants. For the reasons we explain below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Between January 2014 and August 2015, the Association hired four termite companies to inspect the buildings at Windham. The inspections revealed an infestation of dry wood termites. The Association's board met several times to review the findings and consider how to treat the infestation, ultimately concluding in January 2016 that fumigation was the best and most effective method. In March 2016, the Association entered a contract with a pest management company to eradicate the termites through fumigation.

On March 30, 2016, in anticipation of vacating the premises, the Lachers made a hotel reservation for the May dates for which the Lachers' building was scheduled for fumigation. The Association sent written notice on April 12, 2016. The notice requested attendance at a fumigation preparation meeting and notified members that fumigation was scheduled to occur between May 16 and May 28. It also notified members that it was a legal requirement to leave a key with the pest management company. Pamela

Lacher attended a fumigation meeting on April 18, but she did not sign the occupant fumigation notice agreeing to temporarily vacate the premises and turn over a copy of her key to the pest management company. Attorneys for the Association also sent letters regarding the fumigation to the Lachers May 5 and May 11. On May 12, Pamela Lacher sent an open letter challenging the fumigation decision. Several residents of her building signed the last page of the letter.

On May 17, 2016, the Association filed a complaint against Roslyn and Pamela Lacher individually and as trustees of The DSG Trust Dated November 29, 2001,[1] seeking damages for breach of declaration of restrictions, equitable relief to ensure compliance with the Civil Code and CC&R's, and declaratory relief interpreting governing documents. The same day, the Association filed a certificate of compliance with Civil Code section 5950, subdivision (a),[2] stating alternative dispute resolution (ADR) was not required because preliminary or temporary injunctive relief was necessary.

Between May 24 and May 25, Pamela Lacher exchanged e-mails with the attorney for the Association regarding the fumigation. On May 24, 2016, the Association filed a motion for preliminary injunction, with a proceeding set for June 30. On June 1, the Association filed an ex parte application for a temporary restraining order to compel

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1 The complaint named several other owners and occupants of the building as defendants. This appeal regards only the Lachers; the remaining defendants are only referenced as they relate to the issues raised by the Lachers on appeal.

2 All further section references are to the Civil Code, unless otherwise noted.

access to the Lachers' condominium unit for fumigation, which the court denied without prejudice. Also on June 1, the Lachers signed an occupant's fumigation notice, but they modified the form to state, "Owner/agent will keep the keys but be w/in 5 minutes if necessary to get inside for emergency." The fumigation scheduled for May 26 was postponed.

The day after the court denied the temporary restraining order, the Association sent the Lachers a letter requesting they vacate the unit temporarily and provide a key for fumigation in mid-June. Though the Lachers agreed to vacate the premises, they refused to provide a key to the unit.

On June 24, 2016, Roslyn Lacher filed an answer to the complaint. The same day, the Lachers filed a late opposition to the motion for preliminary injunction.

At the hearing on the preliminary injunction, Pamela Lacher argued she did not need to provide a key to the pest management company: "[T]he only issue is that, under the law, I don't have to give them my key. I can allow them to walk into my house, check for everything they need to do, walk out, and allow them to lock it. And that's the only issue." The Association explained the pest management company needed to ensure there would be no occupants, pets, or other living things in the unit, which is why turning over a key was a requirement. The trial court granted a preliminary injunction, which ordered defendants to "vacate the premises to permit the Association to conduct fumigation of the building, subject to 15 days' notice to the occupants" and required the process to be completed within 20 days. The Association provided formal notice of the new fumigation date at the hearing.

On July 17, the day before fumigation was scheduled to occur, an employee of the pest management company sent Pamela Lacher an e-mail that said, "[W]e will be at your residen[ce] at 9:30 a.m. to get possession of your occupancy notices and Key to the unit!" Pamela Lacher texted back: "If you come I'll call the police[.] [¶] You're not getting the key and I'm bit [*sic*] signing and thanks for the bags[.]"

Sometime before 6:45 a.m. the next day, Pamela Lacher texted the pest management company employee: "Misread your text[.] [¶] So not 8:00 but 9:30[.] [¶] So I'm going to court and coming back we will be out of the house at 9:30[.] [¶] But still not signing and no key[.]" Later the same morning, the Association's attorney e-mailed Pamela Lacher: "Despite the court's order, it is my understanding that you are interfering with the Association's ability to fumigate the building. You have 10 minutes to return to your residence and provide a key to your car and/or unlock the trunk of your car so [the pest management company] can verify there are no persons, plants or animals in the trunk of your vehicle. Should you fail to return and unlock your vehicle within the next 10 minutes, the Association will have a locksmith unlock your trunk and bill you for the charge. Alternatively, the Association may have your vehicle towed from the garage."

The pest management company accessed the Lachers' unlocked condominium unit but needed the help of a locksmith to make a key.[3] At around 10:45 a.m. on July 18, the

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[3] The Lachers left the condominium unit unlocked, but after the pest management company checked the premises there was no way to lock the unit without the help of a locksmith because it was a deadbolt lock.

police responded to a call they received from Roslyn Lacher, who reported a break-in of her unit. The pest management company provided a copy of the preliminary injunction to the police, who left.

Shortly thereafter, Pamela Lacher texted the pest management employee: "Really you broke into my house? [¶] And now you're going for the key? [¶] You called BMW and they will give you an emergency key without my permission sent icing info [*sic*]? [¶] It's $500 FYI. [¶] And has to be keyed to the car or it wouldn't work? [¶] And your gonna break into car cause you can't get a key? [¶] You will definitely get arrested[.] [¶] Especially since I have it in writing[.]"

A couple hours later, the police returned to the Lachers' unit based on a call from Pamela Lacher, who reported a break-in of her unit a couple minutes earlier. Pamela Lacher was present. The pest management employee showed the officers a copy of the preliminary injunction. When the police approached Pamela Lacher, she left without speaking to them.

On July 20, 2016, a default was entered against Pamela Lacher, as an individual and as Trustee of the DSG Trust Dated November 29, 2001.

On August 8, 2016, the Association filed a motion to be deemed a prevailing party, sought attorney fees and costs, and requested a judgment of dismissal. On August 26, 2016, the Association filed a notice of nonopposition to the request for attorney fees. The same day, other defendants filed an ex parte motion for a continuance.

On August 29, 2016, Roslyn and Pamela Lacher filed an ex parte application to continue the attorney fees hearing along with a request to file supplemental briefing. The

motion also joined the other defendants' request for continuance. The Lachers also filed an opposition to the motion for attorney fees on August 29, which the court did not consider because it lacked a proof of service, was filed late, and Pamela Lacher was in default, so was not entitled to file the motion on her own behalf. Nonetheless, the court continued the hearing to October 21, 2016, and permitted the parties to file supplemental opposition and reply papers, which they did.[4] On October 21, the trial court dismissed with prejudice the first cause of action regarding damages, and the requests for damages in paragraph Nos. 4 and 5 of the prayer for relief.

On November 2, the Association filed a notice of partial settlement with other defendants.[5] On November 4, the court heard arguments on the attorney fees and determined the Association was the prevailing party. On November 7, the Association filed a notice of ruling that stated the Lachers were jointly and severally liable for the attorney fees award. The Lachers filed a notice of opposition to the proposed judgment on November 23, stating the court ordered "all defendants to be jointly and severally liable."[6] (Boldface and underlining omitted.) The court entered the judgment against the Lachers, noting the joint and several obligation applied to defendants Roslyn Lacher,

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4 The Lachers filed an opposition; however, the court ruled Pamela Lacher was in default and lacked standing. Pamela Lacher withdrew the opposition as to herself and proceeded on behalf of Roslyn Lacher.

5 The terms of the agreement were not included in the record.

6 The court said, "Somebody is going to have to pay their bill. Ultimately, it's going to be proportionately divided, I assume, between the people who live on the premises. You may be one of them, but you are going to help defray it because you are part of the reason they had to file a lawsuit."

Pamela Lacher, and the DSG Trust Dated November 29, 2001. It later added costs to the judgment. Defendants Roslyn and Pamela Lacher filed a notice of appeal February 15, 2017.

II

DISCUSSION

A. Effect of Pamela Lacher's Default

The Association contends Pamela Lacher has no basis for challenging the preliminary injunction or the award of attorney fees because she defaulted. We agree.

An entry of default cuts off the right to appear in the action or participate in the proceedings. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386.) Procedurally, the entry of a default bars an appellant from filing pleadings and motions or advancing contentions on the merits. (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823 (*Eskandarian*).) Moreover, after a default, a defendant is deemed to admit the material allegations of a complaint for purposes of the action, and a collateral attack lies only for "a claim that the judgment is void on its face for lack of personal or subject jurisdiction or for the granting of relief which the court has no power to grant." (*Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1156 (*Molen*).)

Here a default was entered against Pamela Lacher on July 20, 2016. Pamela Lacher never moved for relief from the entry of default, and she appeared at subsequent hearings on behalf of Roslyn Lacher only. Thus, she is deemed to have admitted the material allegations of the complaint that gave rise to the preliminary injunction, and any

effort to argue the merits of the preliminary injunction or the award of attorney fees and costs is barred. (See *Eskandarian, supra*, 150 Cal.App.4th at p. 824.) Moreover, any collateral attack on the judgment must be based on jurisdictional issues (*Molen, supra*, 64 Cal.App.4th at p. 1156), none of which is raised by Pamela Lacher. Accordingly, we affirm the trial court's judgment and award of attorney fees and costs as to Pamela Lacher.

B. Procedural Challenges

The Association argues it would be improper for us to consider the procedural issues raised after the court issued the preliminary injunction because our review is necessarily limited to issues presented to and considered by the trial court, which the Lachers waived by not raising them at the time the trial court issued the preliminary injunction. (See *McMillin Development v. Home Buyers Warranty* (1998) 68 Cal.App.4th 896, 911.)

The Lachers did not file a timely opposition to the motion for preliminary injunction and, while making oral arguments, the Lachers limited their concerns to the necessity of the preliminary injunction, stating, "[T]he only issue is that, under the law, I don't have to give them my key." However, in her supplemental opposition to the motion for attorney fees, Roslyn Lacher subsequently argued the Association failed to comply with ADR and notice requirements.

We need not decide whether the Lachers' limited response to the initial motion for preliminary injunction waived any procedural attacks because even assuming the

procedural challenges to the preliminary injunction were not waived, the Association met the procedural requirements for seeking the injunction, as we explain.

1. *The Association Complied with Section 5930*

The Lachers contend section 5930 required the Association to pursue ADR before filing suit.

"[Our] interpretation of a statute is a question of law which we review de novo. [Citation.]" (*Clayton v. Superior Court* (1998) 67 Cal.App.4th 28, 31.) In construing the meaning of a statute, we "determine and effectuate legislative intent" by looking to the statute's language. (*Woods v. Young* (1991) 53 Cal.3d 315, 323.) "[W]e strive to harmonize the law and avoid an interpretation that requires any part of the enactment to be ignored." (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 372.)

The general rule is an association or member is prohibited from filing an enforcement action before attempting to submit the dispute to ADR. (§ 5930.) Section 5930, subdivision (b) clarifies that the requirement applies only to enforcement actions that are solely for declaratory, injunctive, or writ relief and to actions seeking those types of relief in conjunction with monetary relief in an amount that does not exceed $10,000. However, section 5950 creates an exception if preliminary or injunctive relief is necessary, as certified by the party bringing the suit. (§ 5950, subd. (a)(3).)

The Association filed an enforcement action seeking injunctive and declaratory relief to enforce the CC&R's and section 4785. Because it certified temporary or preliminary injunctive relief was necessary, bringing the matter within an exception to the general rule (see § 5950), there was no requirement to pursue ADR first. The

Lachers' contention that the Association failed to comply with the requirements of section 5930 because injunctive relief was unnecessary confuses the procedural requirement that a party certify the need for preliminary injunctive relief, which occurred here, with the substantive requirements for proving that need, which we address *post*.[7]

2. *The Association Met the Notice Requirements of Section 4785*

The Lachers contend the Association failed to meet the statutory notice requirements. Section 4785, subdivision (b) requires notice of the need to temporarily vacate the premises no less than 15 days and not more than 30 days prior to the date of the temporary relocation. Subdivision (c) states notice is complete upon either personal delivery or individual delivery to the occupant; individual delivery includes first-class mail. (§§ 4040, 4785, subd. (c)(1)-(2).) If the occupant is not the owner, then notice must also be provided to the owner by individual delivery before it is deemed complete. (§ 4785, subd. (c)(1)-(2).)

Here, the property was owned by The DSG Trust dated November 29, 2001, with the Lachers as trustees, and it was occupied by the Lachers. Thus, either personal delivery or first-class mail to the Lachers' address would satisfy both notice to the occupant and to the owner. (See §§ 4040, 4785, subd. (c)(1)-(2).) Fumigation was

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[7] The Association filed a request for judicial notice pursuant to Evidence Code section 452, subdivision (c) to introduce the legislative history of Assembly Bill No. 1544, including five analyses that address the " 'temporary, summary removal' " language in Civil Code section 4785. The issues on appeal are susceptible to resolution without resort to this legislative history. Accordingly, this request is denied. (See, e.g., *Messenger Courier Assn. of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1088; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 613, fn. 29.)

scheduled to occur between May 16 and May 28, 2016. Windham mailed a letter which included the legally required information, dated April 12, 2016, to all residents and owners.[8] Meetings were held throughout April, and Pamela Lacher attended a fumigation meeting April 18, 2016, 30 days before fumigation was scheduled to start. At this meeting, the Association supplied the Lachers with an occupant's fumigation notice to take home. An attorney also sent hand-delivered letters to the Lachers on May 5 and May 11, 21 days and 15 days before the Lachers' building was scheduled for fumigation. Even if the initial notice did not meet the statutory notice requirements, subsequent hand-delivered notices did. Moreover, the Lachers were not prejudiced by any potential deficiency because they had actual notice, as evidenced by the hotel reservation for the dates of fumigation, as well as by attendance at the community meeting April 18 and Pamela Lacher's open letter challenging the fumigation, dated May 12.

C. Issuance of the Preliminary Injunction

The Lachers contend the trial court improperly issued the preliminary injunction because there was insufficient evidence. "[T]he decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) We review the trial court's decision for an abuse of discretion. (*Ibid.*) We will find a trial court abused its discretion only if it has " ' " 'exceeded the

8 It is not clear from the record on what date occupants and owners received this notice, though presumably it was not before April 13, 2016, the day after which the notice was mailed and 33 days before fumigation was scheduled to begin.

bounds of reason or contravened the uncontradicted evidence.' " ' " (*Ryland Mews Homeowners Assn. v. Munoz* (2015) 234 Cal.App.4th 705, 711.)

The party challenging the injunction bears the burden of making a clear showing of an abuse of discretion. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1047 (*Oiye*).) "In reviewing an order granting a preliminary injunction, we do not reweigh conflicting evidence or assess witness credibility, we defer to the trial court's factual findings if substantial evidence supports them, and we view the evidence in the light most favorable to the court's ruling. [Citation.]" (*City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 298-299 (*Corona*).)

The parties disagree as to whether the court issued a prohibitory or mandatory injunction.[9]

"[A]n injunction is prohibitory if it requires a person to refrain from a particular act and mandatory if it compels performance of an affirmative act that changes the position of the parties." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446, 447-448.) When a preliminary injunction mandates an affirmative act that changes the relative positions of the parties, we scrutinize it more closely for abuse of

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9 The Association's motion for a preliminary injunction sought a mandatory injunction. However, a trial court's designation of an injunction as prohibitory or mandatory is not binding on the appellate court. (*People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13.)

discretion.[10] (*Corona, supra,* 244 Cal.App.4th at p. 299; *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 630 (*Stender*).)

We need not resolve the dispute over the type of injunction because even under the heightened scrutiny required for a mandatory injunction (*Corona, supra,* 244 Cal.App.4th at p. 299), the court did not abuse its discretion here. "An appeal from an order granting a preliminary injunction involves a limited review of these two factors—likelihood of success on the merits and interim harm. If the trial court abused its discretion on either factor, we must reverse. [Citation.]' " (*Stender, supra,* 212 Cal.App.4th at p. 630.)

1. *Likelihood of Prevailing on the Merits*

Courts generally uphold decisions made by the governing board of a homeowner's association, as long as the decision " 'represent[s] good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.' " (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 264.) In *Lamden*, a condominium owner challenged the homeowners association's decision to select a secondary treatment to address a termite problem. (*Id.* at pp. 264-265.) Our Supreme Court explained that when "a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its

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10 Mandatory injunctions are permissible under Code of Civil Procedure section 526, subdivision (a) when a plaintiff appears entitled to restrain the commission or continuance of an act complained of, either temporarily or if the commission or continuance of an act would produce irreparable or great injury. (*Id.*, subd. (a)(1) & (2).)

authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Id.* at p. 265.)

The Association hired four termite companies to inspect the buildings at Windham, and those inspections revealed an infestation of dry wood termites in the buildings and structures. The board met several times to review the findings and consider how to treat the infestation, and it ultimately concluded fumigation was the best and most effective method. Moreover, both the Civil Code and the CC&R's provided for the temporary, summary removal of a resident upon the Association's notice to allow the Association to fulfill its obligation to treat the infestation. (§ 4785.) This evidence indicated the Association had a legal obligation to treat the termites, a statutory and legal right to request the removal of the Lachers, and it had met its obligation to select a method of treatment in good faith. Thus, there was ample evidence to demonstrate the Association's likelihood of success.

The Lachers' narrow reading of a resident's role in allowing an association to engage in the "prompt[] effective treatment of wood-destroying pests or organisms" (§ 4785, subd. (a)) ignores the realities of safe fumigation. Section 4785 reflects an intent to balance public safety concerns with an association's obligation to maintain common use areas, including from wood-destroying pests. " ' "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the [L]egislature apparent by the statute . . . ." ' " (*Webster v. Superior Court* (1988) 46 Cal.3d 338, 344.) The Civil Code and the CC&R's place responsibility on the Association for the repair and

maintenance of common areas infested with termites (§ 4780, subd. (a)), which would only be possible with residents' cooperation.

California law recognizes public safety is paramount in the management of pest control, which is one reason pest management companies must use secondary locks on spaces they fumigate. (Bus. & Prof. Code, §§ 8505.7 & 8520.1; Cal. Code Regs., tit. 16, § 1970.3; *id.*, § 1970.4 [requiring disclosure that a "lethal gas (poison) will be used in the building"].) While the pest management company controls the secondary lock (Cal. Code Regs., tit. 16, § 1970.3), unless it is able to control the primary lock, it cannot ensure the absence of occupants, pets, or other living things in the unit during fumigation, as required to ensure public safety from the lethal chemicals. (See Bus. & Prof. Code, §§ 8505.7 [requiring space being fumigated to be vacated], 8505.8 [requiring space being fumigated to be sealed]; Cal. Code Regs., tit. 16, § 1970.4 [requiring disclosure that lethal gas will be used in the building].) This was exactly the situation the pest management company encountered here; because the Lachers refused to provide a key to their residence and agreed only to provide access to the property in the case of an emergency, the pest management company could not ensure the absence of all living organisms within the property throughout fumigation.[11]

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11 The homeowners' behavior is a useful illustration for why a copy of the homeowners' key would be necessary. However, " 'we merely decide whether the trial court abused its discretion based on the record before it at the time of the ruling.' " (*Stender, supra,* 212 Cal.App.4th at p. 631, citing *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625-626.) Thus, the homeowners' behavior after the trial court issued the preliminary injunction is not relevant to whether the trial court abused its discretion.

The trial court heard arguments from the Lachers about their willingness to vacate the unit and unwillingness to turn over a key. It sought information from the Association for why the pest management company needed a key, then issued the preliminary injunction ordering the Lachers to vacate the premises for the purpose of permitting the Association to conduct fumigation of the building. Implied in this directive was that the Lachers not impede the Association's obligation to repair damage from wood eating pests to the common areas.

2. *Interim Harm*

The Lachers bear the burden of clearly showing an abuse of discretion. (*Oiye, supra,* 211 Cal.App.4th at p. 1047.) Yet, they failed to articulate what harm they would suffer by temporarily vacating their condominium or from delivering a copy of their key to the pest management company. In contrast, the Lachers' refusal to comply with the pest management company's requests for a copy of the residents' key and temporary removal from the home would have further delayed fumigation, resulting in additional structural damage and contractual damages owed to the pest management company of up to $1,100 per day of delay, and it undermined the Association board's authority and ability to fulfill its duties under the CC&R's. Moreover, another unit owner in the building requested the preliminary injunction be ordered so her unit would not be damaged and could be treated. Viewing the evidence in a light most favorable to the court's ruling, the trial court did not abuse its discretion by issuing the temporary restraining order.

3. *The Lachers' Opposition to the Preliminary Injunction*

Finally, the Lachers contend the court abused its discretion because it did not review the opposition to the motion for preliminary injunction. This was because the Lachers did not timely file their opposition. "[A] trial court has broad discretion to accept or reject late-filed papers." (*Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 262 (*Hazelbaker*); Cal. Rules of Court, rule 3.1300(d).) Nothing in the record indicates the Lachers attempted to demonstrate good cause for failing to adhere to the applicable deadline.[12] Moreover, the court considered the Lachers' concerns because it permitted them to present arguments orally.

Having concluded the trial court did not err in issuing the preliminary injunction, we turn now to the attorney fee issues.

D. Award of Attorney Fees

While a review of the legal basis for an award of attorney fees is subject to independent review, "the trial court's determination of the prevailing party for purposes of awarding attorney fees is an exercise of discretion, which should not be disturbed on appeal absent a clear showing of abuse of discretion." (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176.)

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12 In addition to representing Roslyn Lacher, Pamela Lacher appeared in propria persona. This does not excuse the untimeliness of the filing, both because she is an attorney and because a litigant appearing in propria persona is not entitled to greater consideration than an attorney. (*Hazelbaker, supra*, 2 Cal.App.5th at p. 262.)

1. *Timing of Request for Attorney Fees*

The Lachers contend there is no legal basis for the award of attorney fees because the request was premature. Though Pamela Lacher argues that "for a motion for attorney fees to be timely, there must be a no[tice] of entry or an entry of final judgment and the motion must be brought within the time to appeal [therefrom]," this conclusion is inconsistent with the *Carpenter v. Jack in the Box Corp*. (2007) 151 Cal.App.4th 454 case she cites to support her proposition. *Carpenter* established an outside limit for seeking attorney fees; it did not identify the earliest possible time a party can make the request. (*Id.* at p. 468 [history of Cal. Rules of Court, rule 3.1702 indicates outside time limit is defined by entry of a final judgment].) The request was not premature here. The court entered a dismissal of the legal cause of action and requests for relief with prejudice on October 21, 2016. This left the equitable claims and remedies, for which the Association sought a judgment of dismissal when it requested attorney fees. Because the dismissal would have disposed of all the causes of action, the timing was appropriate for determining a prevailing party.

2. *Determination of Prevailing Party*

A prevailing party is one who has prevailed on a practical level, by achieving its main litigation objectives. (*Hazelbaker, supra*, 2 Cal.App.5th at p. 262.) A prevailing party may have realized litigation objectives by judgment, settlement, or in some other way. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 622.) Thus, a prevailing party may be one that obtains a preliminary injunction (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 316 [Code Civ. Proc., § 1021.5, private Attorney General doctrine]), one who

achieves the goals of a request for injunctive relief through a stipulated judgment (*Elster v. Friedman* (1989) 211 Cal.App.3d 1439, 1444), or a party against whom a SLAPP suit has been voluntarily dismissed. (*Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 106-107.)

For example, in *Hazelbaker*, the defendants made changes to their patio area that exceeded the scope of approval from the homeowners association. (*Hazelbaker*, *supra*, 2 Cal.App.5th at p. 256.) The parties engaged in ADR, which resulted in a written agreement to address the dispute. (*Ibid*.) When the defendants did not comply with the agreement, the association filed a suit for specific performance and declaratory relief. Before the matter went to trial, the parties reached an agreement as to the substance of the modifications, but they disagreed about who should bear the litigation costs. (*Id.* at pp. 256-257.) Though there was no substantive dispute remaining, the association filed a motion for attorney fees and costs pursuant to section 5975, subdivision (c), which the court ultimately granted. (*Hazelbaker*, at p. 257.) The appellate court explained: "Because the Association achieved that main litigation objective, it was properly considered to have prevailed in the action as a practical matter, even though the only judgment resulting from the case related to the award of fees and costs, not the merits of the complaint." (*Id.* at p. 262.)

Similarly here, the substantive claims were resolved when the court awarded attorney fees and costs because the court had dismissed the cause of action for damages for breach of a declaration of restrictions. All that remained were the equitable causes of action, which the Association sought to dismiss because the fumigation had occurred.

Thus, the litigation was in a proper procedural position for the court to assess whether the Association was a prevailing party.

The Association's litigation objective was to promptly and safely fumigate the premises. This goal was achieved at least in part due to the preliminary injunction, which the Association used to thwart attempts by the Lachers to impede the fumigation process. Specifically, the pest management company twice used it to demonstrate it was acting legally when police responded to phone calls from Roslyn Lacher and then Pamela Lacher, reporting break-ins on the first day of fumigation.[13] This evidence provides a reasonable basis for the court's conclusion that the Association is the prevailing party.[14]

3. *Reasonableness of Attorney Fees Award*

Finally, the Lachers contend the award is unreasonable because it does not provide an offset for money paid by other, settling defendants. The Lachers direct us to the notice of partial settlement agreement to show that settling defendants paid attorney fees; however, the notice of partial settlement merely notes a dismissal as to two other defendants will be entered within 45 days of "[p]ayment of the agreed upon sum by Settling Defendants to Association." Lacher does not direct us to evidence in the record

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13 Pamela Lacher wrote on the initial occupant fumigation notice she signed in May that she would be five minutes away and available to provide access to the unit. It is not clear if she returned to unlock her vehicle when the attorney for the Association contacted her to do so on the date of fumigation in July.

14 In the proposed order for the preliminary injunction, the Association sought language requiring the Lachers to sign occupancy notices and turn over a key. These requested directives, like the general one the court issued, were to ensure prompt and safe fumigation. Thus, their exclusion does not undermine the court's conclusion that the Association achieved its litigation goal and was the prevailing party.

showing this sum is to cover attorney fees (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; Cal. Rules of Court, rule 8.204(a)(1)(C) [requiring briefs to support arguments with appropriate record references]), and our review of the record uncovered no copy of the settlement agreement. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [court may treat failure to provide citation to portion of record to support contention as waived issue]; see *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 775 [issue waived because record lacked evidence for appellate court to evaluate argument].)

Though the Lachers filed a notice of opposition to the proposed judgment, stating the court ordered "all defendants to be jointly and severally liable," at the time the judgment was entered, only the Lachers remained defendants to the suit, and the court entered the judgment awarding attorney fees against the Lachers despite the objection. (Boldface and underlining omitted.) Accordingly, we cannot conclude the trial court abused its discretion in the amount of the award.

Finally, for the first time in the reply brief, the Lachers request an order directing the Association to disclose the amount of settlement. The Lachers did not make this request of the trial court or in the opening brief on appeal. Accordingly, this request has been forfeited. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [arguments not raised in trial court are waived]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [points raised in reply brief not considered absent good reason for failure to raise earlier], citing *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

E. Appellate Attorney Fees

The Association correctly asserts that if it prevails in this appeal, it is entitled to recover appellate attorney fees. The court explained in *Hazelbaker*: " 'A statute authorizing an attorney fee award at trial court level includes appellate attorney fees unless the statute specifically provides otherwise.' (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499.) Neither section 5975, nor any other provision of the Davis-Stirling Act, precludes recovery of appellate attorney fees by a prevailing party; hence they are recoverable." (*Hazelbaker*, *supra*, 2 Cal.App.5th at p. 265.)

DISPOSITION

The judgment is affirmed. The Association is awarded its costs and attorney fees on appeal, the amount of which shall be determined by the trial court. As such, this matter is remanded to the trial court to determine and award the reasonable costs and attorney fees incurred by the Association related to this appeal.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.